

APPEAL NO. 023101
FILED JANUARY 30, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 13, 2002. The hearing officer determined that the appellant/cross-respondent (carrier) has waived its right to dispute compensability of the claimed injury by not timely contesting the injury; that the respondent-cross/appellant (claimant) sustained a compensable injury on _____; and that the claimant had disability resulting from the injury sustained on _____, beginning May 4 and ending July 1, 2001. The carrier appeals those determinations. The claimant also appeals, contending that the hearing officer erred by limiting "the claimant's injury to sprain/strain of his lumbar and cervical spine." The carrier files a response to the claimant's appeal urging affirmance.

DECISION

Affirmed as modified.

Whether the carrier waived the right to contest the compensability of the claim and whether the claimant sustained a compensable injury and had disability are factual questions for the hearing officer to resolve. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We have reviewed the matters complained of on appeal and conclude that the hearing officer's decision is supported by sufficient evidence. Accordingly, we affirm the decision and order of the hearing officer that the carrier waived the right to contest the compensable injury; that the claimant sustained a compensable injury; and that the claimant had disability from a compensable injury.

The claimant further appeals that the hearing officer erred in defining the injury as a sprain/strain. The hearing officer states in her Findings of Fact that, "On _____, the Claimant sustained a sprain/strain of his lumbar and cervical spine..." The claimant appeals this determination stating, "The injury is to low back and cervical. This injury should not be limited to sprain/strain. This was never an issue..." We agree and for reasons more fully explained below, strike all language limiting the injury to a sprain/strain as surplusage.

In recent decisions addressing carrier waiver, we have held that a carrier may not avoid the mandates of Section 409.021 by the recasting of the primary injury as an extent-of-injury issue. See Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers' Compensation Commission

Appeal No. 021569, decided August 12, 2002; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002. The evidence is clear in this case that the primary claimed injury of _____, included a cervical and lumbar back injury. On April 30, 2001, the company doctor examined the claimant and with regard to the claimant's alleged lumbar injury noted, "his pain is very intense: radiates to his [left] leg". On June 6, 2001, a Radiology Report indicates that the claimant has herniated and bulging discs in the lumbar spine. Accordingly, the hearing officer erred by limiting the injury to a sprain/strain by virtue of the carrier's waiver under Section 409.021, and we modify the hearing officer's determinations to strike all language limiting the claimant's injury to a sprain/strain.

Accordingly, as modified, we affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **ILLINOIS NATIONAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Roy L. Warren
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge